# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

**No. [redacted] 38**

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JAMES G. GLOVER, *et al.*,
*Petitioners,*

—v.—

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *et al.*,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF OF PETITIONERS.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Honorable Court, on April 22, 1968, granted petitioners' petition for writ of certiorari, consenting to review the decision of the United States Court of Appeals for the Fifth Circuit. Petitioners respectfully submit this brief on the merits.

### THE OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on December 5, 1967, is reported at 386 F. 2d 452, and in the Appendix at p. 28. The opinion of the United States District Court for the Northern District of Alabama, Southern Division, ren-

dered on July 28, 1966, and adhered to on November 7, 1966, is unreported, but appears in the Appendix at p. 14.

## JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., § 1254 (1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The only statutory provisions clearly here involved are those which create the National Railroad Adjustment Board, particularly 45 U. S. C., § 153 (First) (i), which is as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties, or by either party, to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Perhaps also here involved are the "jury trial" and "due process" provisions of the United States Constitution, which are as follows:

> Article VII. In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no facts tried by

a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## QUESTIONS PRESENTED.

1. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust intra-Union complaint procedures as a prerequisite to court action?

2. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust intra-Company complaint procedures provided by the collective bargaining agreement as a prerequisite to court action?

3. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to process their complaint before the National Railroad Adjustment Board as a prerequisite to court action?

4. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust (a) intra-Union complaint procedures, (b) intra-Company complaint procedures, and (c) N. R. A. B. procedures, **all three**, as a prerequisite to court action?

5. Do railroad employees who charge racial discrimination by Union and Company in seniority and promotion practices have the burden of pleading detailed facts to demonstrate complete futility in all conceivable extra-judicial or administrative complaint procedures; or does the Union and Company have the defensive pleading burden of demonstrating that applicable grievance procedures actually exist and can fairly operate under the circumstances alleged in the complaint?

## STATEMENT OF THE CASE.

Petitioners invoked the jurisdiction of the District Court because of diversity of citizenship of the parties, because there is a federal question involved, and because the damages claimed exceeded Ten Thousand ($10,000.00) Dollars. The original complaint (Appendix pp. 3-8) charged that respondents, St. Louis-San Francisco Railway Company, and Brotherhood of Railway Carmen of America, have between them a tacit understanding and subrosa agreement to use white so-called "apprentices," to perform the work of "carmen" in order to keep from providing petitioners, who are classified as "carmen helpers," enough hours as "carmen" to permit promotion to "carmen" as called for by the contract. The reason for this scheme is to deprive Negro petitioners of job promotion and to keep the "carmen" classification exclusively white. This has the incidental and secondary result of denying promotion opportunity to the white petitioners who happen to stand on the "carmen helper" seniority roster behind Negro petitioners. Petitioners, Negro and white together, seek an end to this discrimination, and further seek to recover the lost wages resulting from past discrimination. On motions to dismiss, which were unaccompanied by any affidavit or pleading showing the structure, or even the existence, of internal grievance procedures (Appendix pp. 8-13), the District Court wrote on opinion (Appendix p. 14), dismissing the action on the ground that petitioners "have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board (Appendix p. 14). The District Court went on to say:

> The conclusory averment that because of the nature of their claim and the failure of defendant Brother-

hood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace (Appendix p. 15).

After the decree dismissing the original complaint, petitioners, by permission (Appendix pp. 16-18), amended their complaint, adding the following averments demonstrating the factual futility of their attempts to employ any collective bargaining machinery and the so-called internal grievance procedures of the Brotherhood:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation," nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed," but never taken seriously. When the white plaintiffs brought their plight to the

attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company . . . (Appendix pp. 18-20).

Following the amendment of the complaint, and upon motions to dismiss, the District Court found that the amendment did not cure what it concluded was the defect of non-exhaustion of administrative remedies and dismissed the action (Appendix p. 24). On appeal to the Court of Appeals, that court agreed completely with the opinion of the District Court (Appendix p. 28).

## ARGUMENT.

This case is unique in several respects. Perhaps its most novel feature is that it is the only case in which any American court has ever laid down a rule to the effect that a railroad employee complaining of racial discrimination in employment practices must exhaust three separate and distinct non-judicial remedies before he can go to court. It would be fair to say that if the collective bargaining agreement or if the Union constitution should provide several complaint procedures in addition to the three found by the District Court, the District Court, on its rationale, would have also made the exhaustion of each and all such procedures prerequisite to judicial relief. There is no limit to the contractual stumbling blocks which might be erected by Union and Company if the reasoning of the District Court is logically extended to require the exhaustion of all possible extra-judicial remedies.

The sure answer to the District Court's (and to the Fifth Circuit's) insistence on following internal procedures "adopted to promote industrial peace" (Appendix p. 15) is two-fold: (1) in face of active opposition by the Union, these internal procedures are useless; and (2) industrial peace is not promoted by the judiciary's keeping "hands off" where Union-Company cooperation is perpetrating racial discrimination. The allegations in the instant complaint charge that both Union and Company, in discussing the alleged internal Union and Company remedies with petitioners, told petitioners, "Don't waste your time!" (Appendix p. 19). Now Union and Company loudly complain because petitioners **did not waste their time.** Union and Company never affirmatively plead any fact to suggest that an exhaustion of their alleged internal remedies would be anything but the "waste of time" which they themselves described. An expensive and frustrating formality as a prerequisite to court relief does not comport with "due

process of law" or with the constitutional guarantee of a jury trial. To be denied access to the courts **indefinitely** is to be denied access to the courts and to trial by jury.

The decided cases and the legal writers cited at pp. 7-24 of the petition for writ of certiorari, argue more eloquently than petitioners' counsel can for an early opening of the judicial doors without prior resort to alleged internal remedies if they are futile or illusory. There is no need to repeat the citations contained in the petition itself on this subject. They are well summarized in one of the most recent cases, **Desrosiers v. American Cynanamid,** 377 F. 2d 864 (2d Cir. 1967), where **Vaca v. Sipes,** 386 U. S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903 (1967), is correctly interpreted to do away with an insistence upon an exhaustion of internal remedies where there is allegation and proof of collusion between Company and Union to deny an employee his rights.

It is also worth noting that none of the decisions dealing with the N. R. A. B.'s exclusive jurisdiction over claims by railroad employees makes any mention of the failure to exhaust the complaint procedures within the Brotherhood. The reasons for this absence of pronouncement is obvious. Before this case nobody ever conceived of the idea that the internal **political** procedure of a Union is a prerequisite either to statutory administrative remedies or to court action. Title 45, § 153, U. S. C., suggests an exhaustion of the Company grievance machinery before going to the N. R. A. B., but it certainly does not contemplate a previous or simultaneous exhaustion of the constitution procedures of the Union. One reason Congress did not provide such a prerequisite is that the N. R. A. B. was never designed to hear complaints by an employee against his own Union. In the instant case, the District Court (and Fifth Circuit) is adding a prerequisite which Title 45, § 153, does not in-

sist upon, even if petitioners were so naive as to take their complaint to the N. R. A. B.

The meaning of **Walker v. Southern Railway Company**, 385 U. S. 196, 17 L. ed. 2d 294, 87 S. Ct. 365 (1966), rehearing denied, 385 U. S. 1020, 17 L. ed. 2d 559, 87 S. Ct. 699, is that railroad employees are outside the purview of **Republic Steel v. Maddox**, 379 U. S. 650, 13 L. ed. 2d 580, 85 S. Ct. 614 (1965), **whether collusive racial discrimination is involved or not.** In other words, the District Court's jurisdiction in this case is controlled by the provisions of the Railway Labor Act and not by the Labor Management Relations Act or by the provisions of the collective bargaining agreement or of the Union Constitution. This leaves only the question of whether or not N. R. A. B. jurisdiction under the Railway Labor Act is exclusive when allegations such as in the instant case are made.

The alleged N. R. A. B. remedy as a prerequisite to court action, requires separate treatment, **because it cannot be a prerequisite to court action.** An employee does not exhaust his alleged N. R. A. B. remedy on the way to court. If he invokes N. R. A. B. jurisdiction (which cannot consider complaints by a member against his Union) he can never thereafter go to court. The decision of the N. R. A. B. has been held to be final and binding on an employee. **Pennsylvania Railroad Co. v. Day**, 360 U. S. 548, 3 L. ed. 2d 1422, 79 S. Ct. 1322 (1959); **Coats v. St. Louis-San Francisco Railway Co.**, 230 F. 2d 798 (5th Cir., 1956). Other arguments and authorities are set out in pp. 24-46 of the petition for writ of certiorari and will not be here repeated, except for a reiteration of the significance of **Conley v. Gibson,** 355 U. S. 41, 2 L. ed. 2d 80, 78 S. Ct. 99 (1957). The only possible meaning of footnote 4 in **Conley v. Gibson** (unanimously decided), is that the courts must hear cases involving invidious discrimination

which is participated in both by Union and Company, and that in such cases N. R. A. B. jurisdiction is not exclusive.

At p. 4, footnote 3, of their answer to the petition for writ of certiorari, the Brotherhood of Carmen cite **Davis v. Southern Railway**, 256 Ala. 204, 54 So. 2d 308 (1951). It should be noted that **Davis** was expressly overruled by **Milstead v. Atlantic Coastline R. Co.**, 273 Ala. 557, 142 So. 2d 705, cert. den., 371 U. S. 892, 83 S. Ct. 189, 9 L. ed. 2d 124 (1962), which was based on the rationale of **Conley v. Gibson**, *supra*, and **Steele v. Louisville & Nashville R. Co.**, 223 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226 (1944).

## CONCLUSION.

The answer of the Carmen to the petition for writ of certiorari, and the brief which the Carmen filed in the Fifth Circuit, summarize respondents' defense by taking the position that there is no racial discrimination in this case because petitioners are both Negro and white. This assertion is interesting. It proves either that the Carmen are myopic or that they are deliberately attempting to mislead the Court.

The Court knows that in the "good old days" of overt racial discrimination in employment, white petitioners, although admittedly having less seniority than Negro petitioners, would have "run around" Negro petitioners and been promoted to "carmen". No questions would have been asked, and the "carmen" as a classification, would have remained "all white". Under today's closer judicial scrutiny of schemes to discriminate against racial minorities, the Carmen, with Company acquiescence, must be more subtle. So, they have stopped promoting any "carmen helpers", and instead have begun to use all white "apprentices", who have now tacitly become the

only class promotable to "carmen". Respondents here hopefully point to white petitioners as living proof that respondents are not guilty of racial discrimination because they are treating (or mistreating) white and Negro petitioners alike. They gloss over the fact that their treatment of white petitioners is the necessary and direct result of their decision to discriminate against Negro petitioners. Respondents may be admired for the subtlety of a new device, but they should not be congratulated to the extent of allowing a devious method of racial discrimination to continue indefinitely, or permanently, while petitioners beat their heads on the doors of unreal administrative remedies.

Petitioners respectfully pray that the decision and order of the Fifth Circuit be reversed and that the case be remanded for trial on the merits in the District Court where the complaint was originally filed.

Respectfully submitted,

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**Certificate of Service.**

I, William M. Acker, Jr., one of attorneys-of-record for petitioners, hereby certify that I have mailed a copy of

the foregoing brief to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, and to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama, 35203, attorneys of record for all respondents, by U. S. mail, postage prepaid, this ... day of June, 1968.

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William M. Acker, Jr.